

FILE COPY

DEC 30 1926

WM. R. STANSBURY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 372

R. B. MORRIS, doing business as MORRIS & LOWTHER; H. M. HEWITT and LEW NUNAMAKER, doing business as JOHN DAY VALLEY FREIGHT LINE; H. L. LIVINGSTON, doing business as BEND-PORTLAND TRANSIT, and PORTLAND-HOOD RIVER TRUCK LINE, INC., Appellants,

vs.

WM. DUBY, H. B. VAN DUZER, and W. H. MALONE, as the OREGON STATE HIGHWAY COMMISSION, Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

REPLY BRIEF OF APPELLANTS

W. R. CRAWFORD,
EDWIN C. EWING,

Solicitors for Appellants.

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 372

R. B. MORRIS, doing business as MORRIS & LOWTHER; H. M. HEWITT and LEW NUNAMAKER, doing business as JOHN DAY VALLEY FREIGHT LINE; H. L. LIVINGSTON, doing business as BEND-PORTLAND TRANSIT, and PORTLAND-HOOD RIVER TRUCK LINE, INC., Appellants,

vs.

WM. DUBY, H. B. VAN DUZER, and W. H. MALONE, as the OREGON STATE HIGHWAY COMMISSION, Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

REPLY BRIEF OF APPELLANTS

STATEMENT AND ARGUMENT

The appellees have presented an answer to the Motion to Vacate the Decree entered by this Court on October 29, 1926.

It is admitted that on September 28, 1926, the said appellees made and entered an order which directly affected these appellants, as well as others on thirteen other Federal Aided Highways. It is admitted that such order was made under and pursuant of Sections

35 and 36 of Chapter 371 of the Laws of Oregon, as amended, and that: "From the 15th day of October, 1926, to the 15th day of April, 1927, and the said rules, regulations and findings shall govern traffic operations over and upon the following named state highways, to-wit:" (Being named portions of said Federal Highways affected, including the portion of the Columbia River Highway between the East Multnomah County Line and Hood River, a distance of 22.11 miles, being the same portions as were affected by the order entered in 1925.)

This order of September 28, 1926, is set out as Exhibit "B," page 12, of said appellees' answer.

This Court can see that this new order of September 28, 1926, was to go into force and effect on October 15, 1926, ten days before the hearing of this appeal on October 25, 1926. So that at the time of the hearing these appellants were and had since October 15, 1926, been compelled to and are being compelled to suffer the same daily loss and damage by the same order as they suffered by the order of 1925, all as shown in the records and the briefs of appellants.

This new order of 1926 is only a subterfuge, in order to mislead the Courts.

If for instance, it would be possible to obtain large enough pneumatic tires, the appellants instead of being restricted to 12 miles per hour with a combined load of 22,000 pounds, would be entitled to the statutory speed of 18 miles per hour. The absurdity of such a situation is apparent to this Court. (We call attention to page 68 in the appendix of the brief of appellants on the question of speed of trucks. An error was made in the provision regarding speed, and it should read as reversed, from pneumatic tires to solid tires.)

There is no attempt, and there could be no attempt, to deny the statements contained in our motion to vacate, to the effect that the appellants are in the same position, as they were in under the provisions of the order made in 1925.

We call the Court's attention to this present order and the opinions of the District Court upon which the motions to deny the injunctions were granted and the final decree entered in such cause.

Judge Wolverton, in delivering the opinion of the District Court, said:

"The legislature having this power, it also had the power to delegate to the State Highway Commission the authority in cases of emergency to reduce the carrying weight of trucks until the emergency was relieved against. This is all the commission attempted and is attempting to do in the present case. The order of the commission is temporary, not permanent, it reading "until revoked or modified." (P. R. 22.)

Appellants in Par. V., in the argument in their brief, raised the question of the emergency of such order, as there was absolutely no emergency shown. But the following situation has developed by this order of September 28, 1926. No longer is there any fancied emergency even, as under the decision of the District Court the provision "until revoked or modified" has been eliminated and a fixed period of six months from October 15, 1926, to April 15, 1927. So that there is not even a suggestion of an emergency upon which the District Court acted in denying injunctive relief and dismissing the cause.

Therefore, as was contended by these appellants in their brief, the said actions of the said State Highway Commission could not be sustained under the old

order, and under the new order there could be no defense, as there has been a period fixed of six months, in which the appellants have already suffered and will continue to suffer in their business, etc., under a pretended emergency. In other words, the admitted facts show that the object of the appellees is to destroy the operation of trucks in competition with the railroad and steamship lines. It must be understood that all the portions of the highways affected by the order of September 28, 1926, are all Federal Aided Highways, and such highways are parallel to railroad or steamship lines, or both. All of such matters were set out in the amended bill of complaint and were and are admitted to be the facts.

We earnestly request this Court to set aside its decree of October 29, 1926, and grant the relief which was prayed for in the amended bill of complaint, and for other and proper relief in the premises.

We refer to the records and briefs on file, which have already been presented to this Court on the hearing of this appeal on October 25, 1926.

Respectfully submitted,

W. R. CRAWFORD,
EDWIN C. EWING,
Solicitors for Appellants.

No. 1203 5/2

MAY 24 1925

WM. R. STANSON

In the Supreme Court of the United States

OCTOBER TERM, 1925

R. B. MORRIS, doing business as Morris & Lowther; H. E. HEWITT and LEW NUNAMAKER, doing business as John Day Valley Freight Line; H. L. LIVINGSTON, doing business as Bend-Portland Transit; and PORTLAND-HOOD RIVER TRUCK LINE, Inc.,

Appellants,

vs.

WILLIAM DUBY, H. B. VAN DUZER and W. H. MALONE,
as the Oregon State Highway Commission,

Appellees.

No.

Answer to Petition for a Stay

*On Appeal from the District Court of the United States
for the District of Oregon*

I. H. VAN WINKLE,
Attorney-General for the State of Oregon,

J. M. EVERES,

Assistant Attorney-General for the State of Oregon,

Counsel for Appellees.

W. E. CRAWFORD,

EDWIN C. SWING,

Counsel for Appellants.



In the Supreme Court of the United States

OCTOBER TERM, 1925

R. B. MORRIS, doing business as Morris & Lowther; H. E. HEWITT and LEW NUNAMAKER, doing business as John Day Valley Freight Line; H. L. LIVINGSTON, doing business as Bend-Portland Transit; and PORTLAND-HOOD RIVER TRUCK LINE, Inc.,

Appellants,

vs.

WILLIAM DUBY, H. B. VAN DUZER and W. H. MALONE,
as the Oregon State Highway Commission,

Appellees.

No.

Answer to Petition for a Stay

*On Appeal from the District Court of the United States
for the District of Oregon*

*To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Come now William Duby, H. B. Van Duzer and W. H. Malone, appearing as the Oregon State Highway Commission, the appellees above named, and for their answer and the answer of each of them to the petition for a stay filed by the appellants in the above-entitled court and cause, admit, deny and allege as follows:

I

These appellees say that they have no knowledge, information or belief save such as is disclosed in said petition,

that the petitioners have been or now are all owners and operators of motor trucks carrying freight and express as common carriers between Portland, Oregon, and The Dalles, Oregon, and points beyond on the Columbia River Highway, or that said petitioners have been or now are carrying on interstate commerce between the states of Oregon and Washington; and, therefore, as to all such matters these appellees leave petitioners to make due proof thereof.

II

These appellees, constituting the Oregon State Highway Commission, admit that as such State Highway Commission they issued a certain order to take effect October 1, 1925, by which order they limited the gross weight of truck and load permitted upon a certain portion of the Columbia River Highway to 16,500 pounds.

III

These appellees admit that the appellants herein instituted a certain suit in the district court of the United States for the district of Oregon, seeking to obtain a permanent injunction against the State Highway Commission restraining it from limiting said gross weight as aforesaid and praying for a temporary injunction until final hearing and determination of said case.

IV

These appellees admit that such application was heard before the said district court consisting of three judges, one of whom was a circuit judge; that after such application had been denied an amended bill of complaint was filed after consent of the court had been obtained. A new application for a temporary injunction was presented and heard by said district court, consisting of the same three

judges, and that said application on said amended complaint was denied, and that the motion to dismiss, which motion was filed by these appellees, was granted; that upon failure and refusal of appellants to amend or further plead the cause itself was ordered dismissed and a final decree entered in accordance with such order.

V

These appellees admit that the ground upon which said district court denied the application for a temporary injunction upon said amended bill of complaint, and the ground upon which said cause was dismissed, was in general that the State Highway Commission was and is vested with the authority and jurisdiction by the laws of the state of Oregon to fix limitations of the gross weight of truck and load.

VI

These appellees admit that the appellants herein appealed from the decree of the district court denying their said application for a temporary injunction and from the decree dismissing said cause, and admit that such cause is now docketed in this court.

VII

For answer to the several grounds set forth in the appellants' petition for a stay these appellees allege as follows:

- (1) For answer to the declaration of the appellants to the effect that all the allegations in their amended bill of complaint for a temporary injunction were admitted as true by these appellees, it is alleged that any admission as to the truth of such allegations was only such admission as follows as the result of the motion to dismiss filed by these appellees in the district court.

(2) Appellees admit that the order made by the Oregon State Highway Commission diminished or decreased the weight of load and truck from the statutory allowable limit of 22,000 pounds to 16,500 pounds, but in this connection these appellees allege that such order was made pursuant to statutory authority vested in the State Highway Commission by the Oregon state legislature. These appellees admit further such order related to only a portion of the Columbia River Highway, to wit: that portion between the east boundary line of Multnomah county and the west boundary of the corporate limits of the city of Hood River, a distance of approximately 22 miles.

(3) These appellees allege that they have no knowledge, information or belief, save as is disclosed in appellants' petition, as to whether or not it is true that the petitioner, Morris, has been operating his trucks for more than four and one-half years from Portland on said Columbia River Highway, through the portion affected by said order to The Dalles, or that the said petitioners have been so operating prior to said order for various periods, or that long prior to said October 1, 1925, the petitioners purchased trucks weighing from 11,500 pounds to 12,500 pounds; or that petitioners were compelled or that they have paid the highest license fees on their capacity trucks or the charge estimated upon tire width, and as to these matters these appellees leave the appellants to make due proof thereof.

(4) These appellees allege that they have no information, knowledge or belief, save such as is disclosed by the petition of appellants, with respect to the truth of the allegations that petitioners were required to file with the Public Service Commission schedules of operations and tariffs, or that they have done so, or that such schedules

so filed have been adopted by the Public Service Commission of the state of Oregon as just and reasonable, or that the Public Service Commission has informed the petitioners that an increase in said tariffs will not be permitted or that the petitioners adopted such tariffs based upon the capacity load of their said trucks, to wit: a maximum weight of truck and load of 22,000 pounds, or that the said order decreasing the gross maximum weight of truck and load to 16,500 pounds would damage or destroy petitioners' business; and, therefore, as to these matters these appellees leave appellants to make due proof thereof.

(5) Appellees admit that the said order made by the Oregon State Highway Commission and now challenged by the appellants, was made without notice, but allege that the same was made within the purview and provisions of the Oregon statute, and that thereafter notice of such order was given as required by the Oregon statute. These appellees deny that said order was arbitrarily made, or that the same was unreasonable. These appellees deny that the said portion of said Columbia River Highway had been built many years prior to the portion of said highway extending from the east line of Multnomah county to Portland, Oregon, and deny that the portion of said Columbia River Highway from Hood River city to The Dalles had been constructed at the same time as the portion of said highway between Hood River city and the east line of Multnomah county. These appellees admit that the portion of the Columbia River Highway affected by the commission's order was built—not prior to 1920, but during the year 1920; but these appellees deny that said road has been reconstructed, widened, improved or maintained with federal aid funds. These appellees admit that the said portion of said highway affected by said order is in a fair condition of repair, but allege that the state of Oregon has expended in the maintenance and upkeep of

said section of said highway since 1920, the sum of \$209,159.05, or approximately \$9,464 per mile for each of the 22.11 miles affected by said order. These appellees admit that steamboat lines and railroad lines parallel that portion of the Columbia River Highway affected by the commission's order. These appellees admit that a similar order was made reducing the maximum weight of truck and load from 22,000 pounds to 16,500 pounds, and that said order was made effective with respect to many of the public highways of the state. These appellees allege that the allegation made by the appellants to the effect that said highway is not being damaged by the operation of their trucks is not true. With respect to the allegations that petitioners operate only nine trucks of a capacity affected by the commission's order, and the allegations with respect to the effect which the activities of the petitioners have had upon the business of the activities of railroad and steamboat lines, these appellees have no knowledge, information or belief, save as is disclosed in the petition as to whether or not such allegations are true, and, therefore, they leave appellants to make due proof thereof.

Further answering, these appellees deny that said order was made in the interest of the steamboat lines or the railroad lines, or that the same was made to destroy competition furnished by motor trucks, and allege that the occasion and purpose of said order was the preservation of said highway.

(6) Answering further, these appellees deny that the property of petitioners was taken without due process of law, but appellees allege that they have no knowledge, information or belief, save as is disclosed by said petition, with respect to the truth of the allegations that appellants had paid for the privilege of operating a truck of maximum gross weight upon said section of said highway, or

that their business would be destroyed by reason of said order, or that they would be required to purchase additional equipment, or that the freight rates would be changed or modified in any way, or that the petitioners or others operating out of Portland have constructed a freight terminal at Portland at a cost of \$250,000 for the purpose of handling freight in and out of Portland, or that to such terminal many hundreds of tons of freight are handled, or that said order will result in bankruptcy for said petitioners or others operating motor trucks; and as to these matters these appellees leave the appellants to make due proof thereof.

(7) Further answering, these appellees allege that the order challenged was made pursuant to the provisions of section 36, chapter 371, General Laws of Oregon, 1921, as amended by chapter 10, General Laws of Oregon, 1921, special session, and as amended by chapter 145, General Laws of Oregon, 1923; and, therefore, these appellees allege that the declaration in the petition of the appellants to the effect that said Highway Commission is or was without authority to make said order is not true.

(8) Further answering, these appellees deny the allegation that the said order was issued for the sole purpose of destroying competition, and alleged the fact to be that the said order was made for the sole and only purpose of preserving the public highway against damage being done by the heavy truck traffic to which said highway was being subjected by the appellants and others similarly engaged.

(9) These appellees deny that the petitioners are protected under the federal-aided highway legislation, and deny that either the provisions of the laws of the state of Oregon or the acts of Congress surround the petitioners with any protection against the order or act of the Oregon State Highway Commission.

(10) Answering further, these appellees deny that the appellants were or are protected either by state statute or federal law against the order of the commission, and deny that they are entitled to operate their said motor trucks with a gross maximum weight of truck and load of 22,000 pounds contrary to the order of said commission, and deny that the said portion of said highway was constructed or reconstructed pursuant to specifications which will withstand during all seasons of the year the character of traffic to which petitioners and those similarly engaged seek to subject said road, and deny that the said portion of said highway affected by said order was subjected to the use of only four trucks during 1922, of a maximum capacity, and deny that the number of trucks of such capacity operating upon said highway were limited to nine of a maximum capacity; and deny that the said order discriminates against the trucks of said petitioners in favor of the owners and operators of bus lines, and deny that the said order in any way becomes an unlawful burden upon interstate commerce.

(11) Further answering, these appellees deny that the portion of said highway affected by said order required for maintenance the sum of only \$5,000, but alleged the fact to be as heretofore stated, that since 1920 the state has been required to expend on said 22.11 miles the sum of \$208,159.05, and that during the year 1923 there was expended upon said section of said highway \$1,227 per mile, or a total of \$27,117.45; and allege further that as a result of the heavy traffic to which said road has been and is being subjected large portions of the pavement are continually breaking down, with the result that during the years 1924 and 1925 it became necessary to expend for the repair and renewal of said pavement the sum of approximately \$23,000, or \$1,041 per mile. These appellees

deny that a bond in the sum of \$5,000 would be sufficient to protect the public and compensate the state for the loss which it will sustain if the activities of petitioners are in no way to be controlled or restrained by the State Highway Commission, and allege that said sum of \$5,000 is wholly inadequate.

(12) These appellees deny that the petitioners are entitled to protection against the order of the commission, and deny that the commerce clause of the constitution of the United States, the fourteenth amendment thereof, or that any contract between the federal government and the state of Oregon is being violated or in any way wronged or offended by the said order of the Oregon State Highway Commission; and deny that the petitioners will be in any way wrongfully or unlawfully damaged or injured either in their property or business by reason of the acceptance of the Oregon State Highway Commission of the order challenged. These appellees further answering, deny that the appellants are entitled to a temporary restraining order or to any relief under their said petition.

As a further and separate answer, reply and defense to said application for a stay these appellees allege the following facts:

I

That under and by virtue of chapter 237, General Laws of Oregon, 1917, by reference to which said chapter the same is now made a part of this answer, the Oregon state legislature created the Oregon State Highway Commission, which said commission is in this proceeding represented by the appellees herein named, and that under and by virtue of said law the said Highway Commission was authorized, empowered and directed to construct and maintain a system of state highways.

II

That under and by virtue of chapter 423, General Laws of Oregon, 1917, by reference to which said chapter the same is now made a part of this answer, the Oregon state legislature designated and created a system of state highways, among which state highways is the portion of the Columbia River Highway affected by the order of the commission, which order is challenged in these proceedings by the said appellants. By the provisions of said last named law the Oregon State Highway Commission was again authorized, directed and empowered to construct and maintain the said highways, including the section of the Columbia River Highway now under dispute.

III

That under and by virtue of the provisions of chapter 371, General Laws of Oregon, 1921, as amended by chapter 145, General Laws of Oregon, 1923, by reference to which said chapters the same are now made a part of this answer, the Oregon state legislature enacted what is known as the Oregon motor vehicle law, which law provides for the licensing and regulation of vehicles using the public highways of the state; that section 36 of said chapter 371 of the Laws of 1921, as amended by chapter 145 of the General Laws of Oregon, 1923, authorizes, empowers and directs the Oregon State Highway Commission to reduce the maximum load limit of truck and load below the limit specified in said act whenever in the judgment of the Highway Commission such action is necessary for the preservation of a state highway or any part thereof.

IV

That pursuant to said state statutes the State Highway Commission on the 28th day of August, 1925, made and entered of record an order reducing the load limit permitted upon the section of the Columbia River Highway now in dispute from a maximum of 22,000 pounds to 16,500 pounds, which said order, omitting the title, was in words and figures as follows:

Whereas, the Columbia River highway between the east boundary of Multnomah county and the west limits of the city of Hood River has been designated and declared to be and is a state highway and has been improved and is being maintained by the State Highway Commission pursuant to the laws of the State of Oregon as a state highway; and

Whereas, the above named state highway in the judgment of the State Highway Commission is being subjected to a kind and character of traffic which is damaging and injuring said highway and in order to protect said highway against such damage and injury, it is deemed and is the judgment of the Highway Commission and said commission finds that it will be for the best interests of said highway that the maximum weights now permitted and authorized by law be reduced; and

Whereas, the State Highway Commission has after due investigation determined and found, and it is the judgment of the commission, that the maximum weights which shall be permitted upon the said road shall be reduced and fixed as in this order provided.

Now, therefore, the premises being in part as above stated, and the State Highway Commission having as a result of due investigation found and does find that said road is being damaged and injured on account of the kind and character of traffic now being hauled over and upon said road, and by reason of the fact that loads of the maximum weight moved at the maximum speeds specified by the provisions of the laws of the state of Oregon are

breaking up, damaging and deteriorating the said road, and the commission having found and does find upon due investigation that it will be for the best interests of the said state highway that the maximum weight of load permitted upon said road shall be reduced from 22,000 pounds to 16,500 pounds, and that the maximum weight of 600 pounds per inch for tires having a width in excess of 30 inches shall be reduced to 450 pounds per inch of tire width, and that the maximum allowable load for tires having a width of less than 30 inches shall be reduced from 500 pounds per inch width of tire to 375 pounds per inch width of tire;

It is hereby ordered, that the maximum weight of combined load and vehicle which shall be permitted upon said road shall not exceed 16,500 pounds, and that on any vehicle having a total tire width of less than 30 inches the concentrated weight in pounds bearing on the surface of the highway at contact with the tread of the two wheels of any one axle of such vehicle shall not exceed the product of the sum of the tire widths of the two wheels of such axle multiplied by 375 pounds; and on any vehicle having a total tire width of 30 inches or more than 30 inches the concentrated weight in pounds bearing on the surface of the highway at contact with the tread of the two wheels of any one axle of such vehicle shall not exceed the product of the sum of the tire widths of the two wheels of such axle multiplied by 450 pounds.

It is further ordered, that these rules and regulations as made and found by the State Highway Commission under the provisions of chapter 371 of the Laws of Oregon for 1921, as amended by chapter 8 of the General Laws of Oregon, 1921 Special Session, shall be in full force and effect from and after October 1, 1925, until revoked or modified by the State Highway Commission.

And it is further ordered, that a notice be posted in a conspicuous manner and place at each end of said highway, and at every cross-roads, so that said notice can be readily seen and read, which said notice shall state plainly the limitations and prohibitions of traffic hereby in this order determined and fixed.

And be it further ordered, that a certified copy of this order be furnished to the county clerk of Hood River county, and that a certified copy of said order be furnished the Secretary of State for the information of the chief of the Traffic Enforcement Division.

Dated this twenty-eighth day of August, 1925.

OREGON STATE HIGHWAY COMMISSION,

By Wm. Duby, Chairman,
H. B. Van Duzer, Commissioner,
W. H. Malone, Commissioner.

Attest:

Roy A. Klein,
State Highway Engineer and Secretary.

V

That said order, as is disclosed from the contents thereof, went into effect October 1, 1925, and was to remain in effect until revoked or modified by the State Highway Commission.

VI

That the appellants in this suit challenged the validity of said order in the district court of the United States for the district of Oregon, and asked for a temporary restraining order, and ultimately for a permanent injunction. Said application was heard as required by law by three judges, and was denied. Thereafter the appellants, with the permission of the court, filed an amended complaint and renewed their application for a temporary restraining order. Said application was heard by the court and again denied, and on motion of these appellees the complaint was dismissed, and upon failure of the appellants to further plead the cause was dismissed, from which order or orders the appellants have appealed to the above-entitled court.

VII

The application for a temporary restraining order, based upon the original complaint, was heard by Honorable William B. Gilbert, judge of the United States court of appeals, ninth district, and the Honorable Charles E. Wolverton and the Honorable Robert S. Bean, judges of the district court of the United States for the district of Oregon, and in denying the said application the court in the opinion written by Judge Wolverton, said:

It is not questioned that the section of the Columbia River highway concerned in the present controversy is a rural post road within the purview of the federal statutes applicable, and it can hardly be disputed that the State Highway Commission exercises, by delegation from the state police powers in so far as it pertains to the maintenance of the state highways in proper condition and repair for the protection and general welfare of the public. (*Hendrick v. Maryland*, 235 U. S. 610, 622.)

It is the chief contention of counsel for plaintiffs that the federal enactments by which aid by the general government was extended to the several states for the construction and maintenance of highways within the states, and the acceptance thereof by the State of Oregon as required by Congress, constitute a contract which the state is bound to observe, and from which it can not withdraw, and that such contract is one which inures to the benefit of the users of the highways, and which they are at liberty to invoke for the protection of their respective rights and privileges. Whether such correlative legislation can be termed a contract or not, it does constitute a legal status from which the state can neither withdraw nor alter, modify or qualify, without the consent or cooperation of Congress, and individuals, when their rights and privileges depending upon such joint and concurrent legislation, are trespassed upon, undoubtedly are entitled to have their relief in a proper form.

But it may be justly questioned whether the action of the legislature of the state fixing, as it did in 1921,

the maximum load weight of trucks used upon the highway at 22,000 pounds, is or constituted a part of that concurrent legislation. We are persuaded that it does not. The statute (being chapter 371, General Laws of Oregon, 1921) was enacted, as its title signifies, "for regulating the use, registration, licensing, taxing, identification, conduct and operation of vehicles and bicycles in the state of Oregon, and for the protection of same; * * *" providing for punishment for violation of this act; prohibiting the unauthorized use or possession of a vehicle," etc., and the matter respecting the maximum load weight to be carried by trucks is plainly germane to the subject embraced by the title. It does not relate to any matter within the purview of the joint and concurrent legislation of Congress and the state respecting the construction and maintenance of rural post roads.

There is no constitutional or legal reason why the state legislature might not at the time have made the maximum truck-load less than 22,000 so that it did not make it so low as practically to rule trucks off the highway, which would raise a legislative question involving discretion touching the reasonableness of the provisions of the act.

The legislature having this power, it also had the power to delegate to the State Highway Commission the authority in cases of emergency to reduce the carrying weight of trucks until the emergency was relieved against. This is all the commission attempted and is attempting to do in the present case. The order of the commission is temporary, not permanent, it reading "until revoked or modified."

The construction and reconstruction of the highways is required to be undertaken, and the work and labor in each state to be done, in accordance with its laws, and under the direct supervision of its highway department, and it is made the duty of the states to maintain the roads constructed according to their respective laws; but should the state fail to properly maintain any highway within its boundaries, the Secretary of Agriculture is authorized, upon giving proper notice, to proceed immediately to place

the same in proper condition. This is a burden imposed upon the general government, and users of the highway have no right or authority to compel the repairs. The government itself will come to their relief if exigency requires. Economically, highways, if falling into decay or disorder, should be protected until repaired or reconstructed, and the act of the state legislative assembly of 1921 recognizes this principle.

Another objection is interposed to the order of the Highway Commission, which is that it was issued without notice to the plaintiffs. This objection is without merit. The public is not entitled to notice of the commission's intention as respects every move it purposes making for the protection of the highway.

Plaintiffs further complain that the commission has failed to keep the highway in proper repair, and that its default in this respect is what has necessitated the order complained of; but that, as we have seen, is a matter for the general government, and not for the public.

In view of these considerations, it must follow that plaintiffs are not entitled to the preliminary restraining order as prayed, and from what has been said it is also apparent that the motion to dismiss should be sustained.

Let orders be entered accordingly.

VIII

When the application of the appellants, based upon their amended complaint, was again heard it was heard by the same three judges, with the result that the application was again denied. The opinion of the court at that time was written by Judge Bean, and is as follows:

After the motion for a preliminary injunction had been denied, plaintiffs, by permission of the court, filed an amended bill, which is substantially the same as the original with the added averments that the highway in question has been permanently constructed; that the plaintiffs are engaged in traffic over it; that they are and have been delivering freight at their termini, Portland and The

Dalles (both in this state), to motor trucks for carriage in and out of the state as a continuous service; that the order of the commission limiting the weight of load and vehicle makes it impossible for them to compete with the railroad which parallels the highway.

The effect of the federal and state highway legislation is considered in the opinion heretofore filed, and we are not disposed to depart from or modify the views therein expressed. In our opinion, the added averments do not entitle the plaintiffs to the relief asked. The state has paramount control over the use of the highways within its border, and it may enact and enforce reasonable regulations governing the traffic over them, necessary to secure their preservation and maintenance, and the public safety. (13 R. E. L., § 212; *Grand Trunk Western Ry. v. South Bend*, 227 U. S. 544.) The highways of the state are, of course, open to intrastate and interstate commerce alike, and the state can not, under the guise of legislation, deny one engaged in interstate commerce the use of its highways. (*Buck v. Kuykendall*, 267 U. S. 307.) But in the absence of national legislation covering the subject, the state may rightfully prescribe uniform regulation adapted to promote safety upon its highways, and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens. (*Hendrick v. Maryland*, 235 U. S. 610; *Kane v. New Jersey*, 242 U. S. 160.) If the state is impotent to protect its highways from destruction by excessively loaded trucks because, forsooth, they may be carrying interstate freight, it is difficult to understand how its right to regulate the speed or movement of such vehicles, or others carrying interstate passengers, can be supported.

The order of the highway commission complained of is not a discrimination against those engaged in interstate carriage or denying them the equal protection of the law. On the contrary, it puts all carriers by trucks on an equality.

The application for preliminary injunction is therefore denied, and in view of the provisions of section 266 of the Judicial Code, as amended in February, 1925, the motion to dismiss the complaint will be sustained.

IX

These appellees further answering the application for a stay, allege that the order made by the State Highway Commission was made for the purpose of protecting the public highway against the damage which was being done by the appellants and others similarly engaged, and was directed not only at the appellants, but, as is disclosed from the order itself, was directed to the public at large; that said order was temporary and was made for the purpose of protecting the highway during the rainy season; that the court in its order denying the application for a temporary restraining order, noted and directed attention to the fact that said order was temporary and not permanent, and as further evidence of that fact it is alleged that the appellees herein named, at their regular meeting held in Portland, Oregon, on March 25, 1926, by an order entered in its minutes, revoked the order challenged by these appellants and by which the maximum load limit was reduced upon the section of the Columbia River Highway now in dispute, and said order is not now and has not been since April 1, 1926, in effect; that the order of the commission revoking its previous order reducing the load limit on said highway is entered at page 1977 of volume 10 of the records and minutes of the Oregon State Highway Commission, and reads as follows: "On motion which was carried, the commission authorized the removal of load limitations on the following highways, effective April 1, 1926: Columbia River Highway between the Multnomah county line and Hood River." Then follows a list of the other highways affected by the orders of the commission by which maximum load limits were reduced. It is manifest, therefore, that appellants are seeking a stay of an order not now in effect.

Wherefore, by reason of the premises these appellees are informed and advised, and respectfully submit, that

the appellants are not entitled to a stay as prayed for, or to any remedy or relief by way of an injunction or otherwise, but these appellees aver on the contrary that the said petition is unfounded, is contrary to law, equity and conscience; and these appellees, having fully answered the matters and things set forth in said petition, pray that said petition and cause be dismissed, and that appellees have their reasonable costs.

I. H. VAN WINCKLE,
Attorney-General for the State of Oregon,

J. M. DEVERS,
Assistant Attorney-General for the State of Oregon,

Counsel for Appellees.

Attest:

ROY A. KLEIN,

Secretary to Oregon State Highway Commission.

State of Oregon, }ss.
County of Marion, }

I, Roy A. Klein, make oath and say, that I am secretary to the Oregon State Highway Commission, appellees in the foregoing answer; that I have read the above answer by me subscribed on behalf of said commission; that I have authority to affix the name of said commission thereto, and that the contents of said answer are true, excepting the matters therein stated on information and belief, and, as to those matters, I believe them to be true.

Subscribed and sworn to before me this 18th day of May, 1926.

Notary Public for Oregon.
My commission expires May 9, 1928.